A **WAN KHAIRANI WAN MAHMOOD**

v.

SRI ALAM SDN BHD

B COURT OF APPEAL, PUTRAJAYA
ZAINUN ALI FCJ
RAMLY ALI JCA
ZAHARAH IBRAHIM JCA
[CIVIL APPEAL NO: W-02-1812-2009]
C 1 OCTOBER 2012

TRUSTS: *Resulting trust - Intention to create trust - Transfer of shares without consideration - Allegation of shares held on trust - Burden to proof existence of trust - Whether intention to create trust established - Whether* D *documentary evidence adduced to prove existence of trust - Whether appellant a mere nominee - Whether appellant held shares as registered and beneficial owner - Takako Sakao v. Ng Pek Yuen & Anor*

E Ismail Mohammed ('Ismail') was a majority shareholder and director of the respondent ('plaintiff') and also Rasa Rata Sdn Bhd ('second defendant'). The appellant ('first defendant'), who was the former wife of Ismail, was a director and a minority shareholder of the second defendant. In 1980, pursuant to a joint venture agreement between the plaintiff and Newacres Sdn Bhd F ('Newacres'), the plaintiff was allotted 100,000 shares in Pacific Developer Credit Bhd ('PDC') and these shares were payments made in kind by Newacres. From the 100,000 units of PDC shares, 85,000 units ('the PDC shares') were transferred to the first defendant's name without any consideration. The second G defendant, *vide* its board resolution, resolved to accept the PDC shares from the first defendant in exchange of 510,000 ordinary shares in the second defendant ('the Rasa Rata shares'). After more than 20 years, the plaintiff filed an action against the first and second defendants claiming, inter alia, that at the material H time, since the first defendant was Ismail's wife, she was thus entrusted to hold the Rasa Rata shares as nominee or trustee for the plaintiff. Allowing the plaintiff's claim, the High Court found that the proprietorship of the shares was governed by the equitable doctrine of resulting trust in favour of the plaintiff. I Dissatisfied with the said decision, the first defendant filed the present appeal. The issue that arose for the court's consideration was whether the Rasa Rata shares transferred to the first defendant was a gift from Ismail or whether the shares were held on trust for the plaintiff.

Held (allowing appeal with costs) A
Per Zainun Ali JCA delivering the judgment of the court:

(1) A resulting trust is a presumption which is dependent on the intention of the parties at the time a property was acquired. The burden of proof alleging the existence of trust was upon B the plaintiff before the burden could be shifted to the first defendant. (paras 13 & 15)

(2) It is trite that for a trust to exist and to be binding, the donor must make his intention clear in that at the time of its C creation, there must be certainty of beneficial interest. The court has a duty to determine whether the plaintiff as the donor intended the property to be held by the first defendant as donee in trust for the plaintiff. It is only in the absence of any other intention of the parties that a presumption that the D first defendant held the property in resulting trust may arise (*Takako Sakao v. Ng Pek Yuen & Anor*; foll). (para 16)

(3) The plaintiff could not directly rely on the presumption of a resulting trust. The facts as to the plaintiff's intention to create a trust must be established. However, there was a failure to E do so here. Even if the plaintiff had successfully proved that the shares were acquired by the plaintiff with its money, it has to show that they were registered in the first defendant's name as its trustee, holding it in its favour, on a resulting trust. Further, it is common knowledge that a company is a separate F and distinct entity from its shareholders. Hence, the existence of trust documents or other supporting documents such as the board of director's resolution becomes necessary. (paras 16 & 19)

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(4) The onus of proof lied on the plaintiff to prove strictly by a preponderance of evidence the intention of the parties at the material time when the PDC shares were transferred to the first defendant. The plaintiff had to show that it was the intention of the parties that the PDC shares were transferred H by the plaintiff to the first defendant as nominee and trustee and that the beneficial interest lied with the plaintiff. (para 16)

(5) There was no evidence to show that the first defendant was informed or made known that she was merely holding the I PDC shares or the Rasa Rata shares in trust for the plaintiff. Further, there was no certainty that at the time the PDC shares were acquired and transferred to the first defendant, it

was meant solely for the plaintiff's benefit. On the facts, the plaintiff did not lead any evidence to prove the plaintiff's intention that the PDC shares were to be held by the first defendant as a trustee or nominee for the plaintiff. Hence, the trial court ought to have drawn an adverse inference against the plaintiff. (paras 16 & 20)

(6) The fact that the first defendant was Ismail's wife when the PDC shares were transferred to her and that no trust document or other supporting documents were prepared by the plaintiff company did not support the existence of a trust. Further, it could be inferred that it was Ismail, who was the majority shareholder and managing director of the plaintiff who effected the transfer of the PDC shares to the first defendant. The plaintiff must be estopped from claiming that the first defendant was a mere nominee. In the circumstances, the impugned shares in the second defendant were held by the first defendant as the registered and beneficial owner thereof and therefore, the first defendant was entitled to those said shares. (paras 21 & 23)

Bahasa Malaysia *Translation Of Headnotes*

Ismail Mohammed ('Ismail') merupakan pemegang saham majoriti dan pengarah responden ('plaintif') dan juga Rasa Rata Sdn Bhd ('defendan kedua'). Perayu ('defendan pertama'), yang merupakan bekas isteri Ismail, adalah pengarah dan pemegang saham minoriti defendan kedua. Pada tahun 1980, melalui satu perjanjian usahasama antara plaintif dan Newacres Sdn Bhd ('Newacres'), plaintif diperuntukkan dengan 100,000 saham dalam Pacific Developer Credit Bhd ('PDC') dan saham ini merupakan bayaran yang dibuat oleh Newacres. Daripada 100,000 unit saham PDC, 85,000 unit ('saham-saham PDC') telah dipindah milik ke atas nama defendan pertama tanpa sebarang balasan. Defendan kedua, melalui resolusi lembaganya, memutuskan untuk menerima saham-saham PDC daripada defendan pertama dengan balasan 510,000 saham biasa dalam defendan kedua ('saham Rasa Rata'). Selepas lebih daripada 20 tahun, plaintif telah memfailkan tindakan terhadap defendan pertama dan defendan kedua menuntut, antara lain, bahawa pada masa material, memandangkan defendan pertama adalah bekas isteri Ismail, dia telah diamanahkan untuk memegang saham-saham Rasa Rata sebagai wakil atau pemegang amanah bagi pihak plaintif. Membenarkan tuntutan plaintif, Mahkamah Tinggi mendapati bahawa pemilik saham dikawal oleh doktrin ekuiti amanah berbangkit yang berpihak kepada plaintif. Tidak berpuas

hati dengan keputusan tersebut, defendan pertama telah memfailkan rayuan ini. Isu yang timbul untuk pertimbangan mahkamah adalah sama ada saham Rasa Rata yang dipindah milik kepada defendan pertama merupakan hadiah daripada Ismail atau sama ada saham tersebut dipegang secara amanah bagi pihak plaintif.

Diputuskan (membenarkan rayuan dengan kos)
Oleh Zainun Ali HMR menyampaikan penghakiman mahkamah:

(1) Amanah berbangkit adalah anggapan yang bergantung kepada niat pihak-pihak pada masa suatu harta diperolehi. Beban pembuktian yang mendakwa kewujudan amanah terletak atas plaintif sebelum beban tersebut beralih kepada defendan pertama.

(2) Adalah matan bahawa untuk suatu amanah itu wujud dan mengikat, pemberi mestilah memastikan niatnya jelas di mana semasa kewujudannya, perlu ada kepastian kepentingan benefisial. Mahkamah mempunyai tugas untuk menentukan sama ada plaintif sebagai pemberi mempunyai niat agar harta tersebut dipegang oleh defendan pertama sebagai amanah bagi pihak plaintif. Hanya dalam ketidakhadiran niat lain pihak-pihak di mana anggapan bahawa defendan pertama memegang hartanah dalam amanah berbangkit akan timbul (*Takako Sakao v. Ng Pek Yuen & Anor*; diikuti).

(3) Plaintif tidak boleh bergantung secara langsung terhadap anggapan amanah berbangkit. Fakta berkenaan niat plaintif untuk mewujudkan suatu amanah mestilah dibuktikan. Walau bagaimanapun, terdapat kegagalan untuk berbuat sedemikian di sini. Walaupun plaintif telah berjaya membuktikan bahawa saham-saham telah diperolehi oleh plaintif dengan wangnya, ia perlu menunjukkan bahawa saham-saham tersebut telah didaftarkan atas nama defendan pertama sebagai pemegang amanah, memegangnya bagi pihak plaintif, berdasarkan amanah berbangkit. Tambahan lagi, diketahui umum bahawa syarikat merupakan entiti berasingan daripada pemegang sahamnya. Oleh itu, kewujudan dokumen-dokumen amanah atau pun dokuman-dokumen sokongan lain seperti resolusi lembaga pengarah menjadi suatu keperluan.

(4) Beban pembuktian terletak pada plaintif untuk membuktikan melalui keterangan kuat niat pihak-pihak pada masa material apabila saham-saham PDC dipindah milik kepada defendan

pertama. Plaintif perlu menunjukkan bahawa adalah niat pihak-pihak bahawa saham-saham PDC dipindah milik oleh plaintif kepada defendan pertama sebagai wakil dan pemegang amanah dan bahawa kepentingan benefisial terletak pada plaintif.

(5) Tiada keterangan untuk menunjukkan bahawa defendan pertama telah dimaklumkan atau mengetahui bahawa dia hanya memegang saham-saham PDC atau saham-saham Rasa Rata sebagai amanah bagi plaintif. Tambahan, tiada kepastian bahawa pada masa saham-saham PDC diperolehi dan dipindah milik kepada defendan pertama, ia hanya bagi manfaat plaintif. Berdasarkan fakta, plaintif tidak mengemukakan sebarang keterangan untuk membuktikan niat plaintif bahawa saham-saham PDC dipegang oleh defendan pertama sebagai pemegang amanah atau wakil bagi pihak plaintif. Oleh itu, mahkamah bicara sepatutnya membuat anggapan bertentangan terhadap plaintif.

(6) Fakta bahawa defendan pertama merupakan bekas isteri Ismail apabila saham-saham PDC dipindah milik kepadanya dan tiada dokumen amanah atau pun dokumen sokongan lain yang telah disediakan oleh syarikat plaintif untuk menyangkal kewujudan amanah. Tambahan lagi, boleh diandaikan bahawa Ismail, yang merupakan pemegang saham majoriti dan pengarah pengurusan plaintif, yang telah memindah milik saham PDC kepada defendan pertama. Plaintif mestilah diestop daripada menuntut bahawa defendan pertama hanyalah seorang wakil. Dengan itu, saham-saham pada defendan kedua telah dipegang oleh defendan pertama sebagai pemilik berdaftar dan benefisial dan oleh itu, defendan pertama layak ke atas saham-saham tersebut.

Case(s) referred to:

Choong Kwee Sang v. Choong Kwee Keong [2008] 5 CLJ 229 CA ***(refd)***
Midland Bank Plc v. Cooke [1995] 4 All ER 562 ***(refd)***
Takako Sakao v. Ng Pek Yuen & Anor [2010] 1 CLJ 381 FC ***(foll)***

For the appellant - Chong Phow Yew; M/s Kamaruzaman Arif, Amran & Chong
For the respondent - Alan Wong; M/s Khalek Awang & Assocs

[Editor's note: For the High Court judgment, please see Sri Alam Sdn Bhd v. Wan Khairani Wan Mahmood & Anor [2009] 1 LNS 719.]

Reported by Kumitha Abd Majid

JUDGMENT

Zainun Ali FCJ:

[1] This appeal before us turns on the issue of whether certain shares ("Rasa Rata shares") which were transferred from Rasa Rata Sdn Bhd ("the second defendant") to the appellant Wan Khairani binti Wan Mahmood ("the first defendant") was a gift from the first defendant's former husband ie, Ismail bin Mohammad ("PW2") or whether the shares were to be held on trust for Sri Alam Sdn Bhd ("the plaintiff"). For ease of reference we will refer to the parties as they appear in the court below.

[2] After a full trial, the High Court allowed the plaintiff's claim against the defendants for a declaration that the 510,000 shares in the second defendant company and registered in the name of the first defendant, are held in trust for the plaintiff.

[3] It is the finding of the trial judge that the proprietorship of the shares is governed by the equitable doctrine of 'resulting trust' in the plaintiff's favour.

[4] However, after hearing the parties, the Court of Appeal allowed the first defendant's appeal and set aside the order of the High Court.

Facts

[5] The undisputed facts are as follows:

(i) PW2, Ismail bin Mohammed is a majority shareholder and director of the plaintiff, Sri Alam Sdn Bhd. Ismail is also a majority shareholder and director of the second defendant, Rasa Rata Sdn Bhd.

(ii) The first defendant, Wan Khairani binti Wan Mahmood is a director and a minority shareholder of the second defendant. The first defendant is also Ismail's former wife.

(iii) In 1980, pursuant to a joint venture agreement between the plaintiff and Newacres Sdn Bhd, the plaintiff was allotted 100,000 shares in Pacific Developer Credit Berhad ("PDC"). These shares were payments made in kind by Newacres to the plaintiff.

(iv) From the 100,000 units of PDC shares, 85,000 units (the PDC shares) were transferred to the first defendant's name without any consideration.

(v) By a board resolution of the second defendant held on 27 November 1981 (the second defendant board of directors meeting), the paid up capital of the second defendant was increased. The second defendant resolved to accept from the first defendant the PDC shares at a value of RM6 per share in exchange of 510,000 ordinary shares at RM1 per share in the second defendant (the Rasa Rata Shares).

(vi) After more than 20 years, by a writ of summons dated 30 October 2003, *the plaintiff filed an action against the first defendant and the second defendant, claiming that the Rasa Rata shares registered in the name of the first defendant are held on trust for the plaintiff.* (emphasis added).

Issue

[6] Thus the issue before us is whether the Rasa Rata shares registered in the name of the first defendant are in fact held in trust by the first defendant for the plaintiff?

[7] The plaintiff's case

(i) The plaintiff contends that the PDC shares were transferred to the first defendant's name as a trustee for the plaintiff. The thrust of the plaintiff's case is on the existence of a resulting trust. The plaintiff's claim is built on the fact that the Rasa Rata shares were paid for by the plaintiff through the transfer of the PDC shares to the second defendant.

(ii) At the trial, the plaintiff called two witnesses. PW1, is a minority shareholder and director of the plaintiff. PW2 is Ismail bin Mohammed. Both testified that there was no documentary evidence to prove that the PDC shares were given to the first defendant as nominee or trustee for the plaintiff.

(iii) In support of the existence of a trust, PW1 testified that the PDC shares were transferred to first defendant's without any consideration. At the material time, the first defendant was Ismail's wife. Therefore she was entrusted to hold the shares as nominee or trustee for the plaintiff.

(iv) PW1 also testified that the first defendant was the plaintiff's nominee when the Rasa Rata shares were issued to the first defendant. This fact was also confirmed by PW2, Ismail bin Mohammed. In support, both witnesses referred to the minutes of the second defendant board of directors meeting. The relevant part of the minutes states as follows:

> Resolved: The Board hereby agree to accept from Puan Wan Khairani Bt Wan Mahmood 85,000 PDC shares (now known as MBK) ... as paid up capital. The Board also agrees to accept the value of each unit of share at $6.00 making a total of $600,00. The Board also agrees that these shares be immediately transferred and registered under the name of RASA RATA SDN BHD.

(v) Ismail also added that the first defendant had no financial means to purchase the shares. It was the plaintiff who had provided the consideration for the acquisition of the PDC shares and consequently the Rasa Rata shares.

[8] The First Defendant's Defence

(i) The first defendant denies any allegation of trust. In her evidence, the first defendant avers that the PDC shares were given by Ismail as a gift during the subsistence of their marriage. This was not made in writing because at the time of the gift she was a housewife and dependant on PW2.

(ii) Nevertheless, the fact that the shares were given by Ismail as a gift was not pleaded in her statement of defence.

(iii) The first defendant also argued that mere allegation that money was paid does not necessarily mean that a resulting trust will arise albeit when the claim for a return of the shares was made after a period of 20 years.

(iv) In fact it is the first defendant's claim that the PDC shares were already given to the first defendant when the second defendant resolved to increase its paid up capital by the PDC shares.

(v) In 2002, a suit was filed by the first defendant against Ismail alleging that Ismail had misappropriated trust monies of RM119,536,026 belonging to the second defendant (the 2002 suit). The monies were earlier paid to Ismail in compensation for the acquisition of certain lands held in trust by Ismail for

A the second defendant. In the 2002 suit, Ismail affirmed an affidavit dated 11 October 2002 wherein he admitted that the impugned shares were registered and beneficially owned by the first defendant.

B **Decision of the High Court**

[9] The High Court judge allowed the plaintiff's claim based on the following reasons:

(i) The defence advanced by the first defendant that that the C shares in dispute were given by Ismail as a gift was not pleaded.

(ii) Ismail in the capacity as director or shareholder cannot give away the plaintiff's shares as a gift. This will go against the D jurisprudence of company law.

(iii) The fact that there is a delay of 20 years in claiming for the return of the shares would not defeat the plaintiff's claim for trust.

E (iv) The fact that there was an affidavit by Ismail in another suit stating that the first defendant was holding the shares as legal and beneficial owner is not sufficient to enable the first defendant to take the property belonging to the plaintiff without any consideration.

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(v) As a general rule when property is conveyed into the name of someone other than the purchaser the doctrine of resulting trust will come into operation unless the exception applies.

G Being aggrieved by the above said decision, the first defendant appealed to the Court of Appeal.

In The Court of Appeal

The first defendant's submission

H

[10] It is the first defendant's case that:

(i) The plaintiff has failed to discharge its onus to prove that the shares are held by the first defendant in trust for the second defendant. There is no iota of evidence to show that the PDC I shares were given to her by the plaintiff as nominee or trustee.

(ii) The trial judge held that Ismail had no right to give the plaintiff's assets to the first defendant. If that is so, the plaintiff's true cause of action must be based on fraudulent breach of trust by its director. The plaintiff's remedy would be for an action to recover property unlawfully dissipated from the company and Ismail should have been named as a defendant in the action.

(iii) By failing to frame the action on fraudulent breach of trust by its director, the first defendant had been prejudiced in that she had lost the opportunity of pleading expressly that the PDC shares were a gift from her former husband to her.

(iv) There was also evidence by way of affidavit filed by Ismail in the 2002 suit admitting that the first defendant is holding the shares as legal and equitable owner. Therefore, the plaintiff is estopped from claiming that the first defendant is a mere nominee.

Decision of the Court of Appeal

[11] After having heard parties we are unanimous in our decision that the appeal by the first defendant is to be allowed. Our broad grounds are as follows:

> We are of the view that the impugned shares in the second defendant are held by the Appellant as registered and beneficial owner - taking into consideration the totality of the facts in this case and therefore the Appellant is entitled to those impugned shares. We therefore allow the appeal with costs.
>
> Costs RM20,000 here and below. Deposit is refunded to the Appellant.

Our reasons are as follows:

[12] The plaintiff's action is founded on the doctrine of resulting trust. The plaintiff avers that the proprietorship of the Rasa Rata shares is governed by the equitable doctrine of resulting trust in the plaintiff's favour in view of the fact that the Rasa Rata shares were paid for through the transfer of the PDC shares to the second defendant.

[13] A resulting trust is a presumption which is dependant on the intention of parties at the time a property was acquired; whereas a constructive trust is one which is one which is imposed by law irrespective of the intention of parties.

[14] We rely on the Federal Court in the case of *Takako Sakao v. Ng Pek Yuen & Anor* [2010] 1 CLJ 381 in support of our view, where the court held that:

> ... In our judgment, the primary function of the court in a case where a resulting trust is asserted or a gift is alleged arising from a disposition of property is clear. It is to determine whether the initial disponor intended to make a gift of the property be it movable or immovable, or whether he or she intended it to be held by the disponee in trust for some other person or persons, including the disponor or the disponee or both. A court when called upon to decide whether a resulting trust or a gift was intended in given circumstances should not begin by resorting to presumptions. It must meticulously examine the facts to objectively ascertain the true intention of the parties. If the intention of the parties when objectively determined was that the particular property was to be held on a resulting trust then that is the conclusion the court should declare. However, if the intention was that the disponee of the property was to have it as a gift, there can then be no question of a resulting trust being implied. It is only when there is absent any indication of what was intended by the parties that the court should resort to presumptions. Were it otherwise, the court may be arriving at an incorrect conclusion based on a presumption when the evidence points in quite the points in quite the opposite direction.

[15] Burden Of Proof Is On The plaintiff

(i) In his finding, the trial judge had resorted directly to a presumption of a resulting trust. His finding is based on sole reason that the Rasa Rata Shares were paid for by the plaintiff through the transfer of the PDC shares to the second defendant.

(ii) The trial judge had been largely influenced by the fact that the plaintiff had contributed towards the purchase of the PDC shares, thereby invoking the presumption of resulting trust.

(iii) In this, the trial judge fell into error because he overlooked the fact that the burden of proof alleging the existence of trust is upon the plaintiff before the burden could be shifted to the first defendant.

(iv) Instead, the trial judge began his finding by rejecting the first defendant's defence of presumption of gift on the ground that it was not pleaded. He further held that there can be no gift made by Ismail to the first defendant. He went on to say that it is an established principle that a company is a separate

entity from its shareholder, Ismail being a director and shareholder of the plaintiff had no legal or beneficial right over the plaintiff's shares.

[16] Intention To Create Trust

(i) We find that the plaintiff cannot directly rely on the presumption of a resulting trust. The facts as to the plaintiff's intention to create a trust must be established. There is failure to do so here. Even if the plaintiff successfully proves that the shares were acquired by the plaintiff with its money, it has to show that they were registered in the first defendant's name as its trustee, holding it in its favour, on a resulting trust.

(ii) It is trite that for a trust to exist and binding, the donor must make his intention clear in that at the time of its creation there must be certainty of beneficial interest. (See *Midland Bank plc v. Cooke* [1995]) 4 All ER 562 at 574. Referred by the Court of Appeal in *Choong Kwee Sang v. Choong Kwee Keong* [2008] 5 CLJ 229).

(iii) Applying the principle in Takako Sakao, the court has a duty to determine whether the plaintiff as the donor intended the property to be held by the first defendant as donee in trust for the plaintiff. It is only in the absence of any other intention of the parties (whether expressed) that a presumption that the first defendant hold the property in resulting trust may arise.

(iv) At this juncture, the onus of proof lies squarely on the plaintiff to prove strictly by a preponderance of evidence the intention of the parties at the material time when the PDC shares were transferred to the first defendant. The plaintiff has to show that it was the intention of the parties that the PDC shares were transferred by the plaintiff to the first defendant as nominee and trustee and that the beneficial interest lies with the plaintiff.

(v) In the absence of any documentary evidence the court can only rely on the testimony of the plaintiff's witnesses.

(vi) In the present case, PW1 and Ismail relied on the minutes of the second defendant board of directors meeting to prove that the PDC shares were transferred to the first defendant as nominee or trustee for the plaintiff. However, a perusal

of the minutes merely manifests that the PDC shares were already given to the first defendant. There was nothing to suggest that the PDC share still belonged to the plaintiff and that the first defendant was merely a trustee. What transpired is that the PDC shares had already been in the first defendant's name and that it was the first defendant who had transferred them to the second defendant as paid up capital.

(vii) It must be noted that the particulars of the transfer of PDC shares to the first defendant remains unfolded. Whilst there was no documentary evidence reflecting the said transfer, there was also no oral evidence adduced as to any meeting of directors or the existence of any company resolution proving the same. Thus, the issue as to who in the plaintiff had effected the transfer of the PDC shares to the first defendant and the intention or purpose behind the transaction remains unclear.

(viii) Before the High Court, the only clear evidence is that the purchase of the PDC shares were made by the plaintiff which evidence had not been disputed nor rebutted. Following that, a remark was given by PW1 in his cross-examination, that Ismail had no right to transfer the plaintiff's assets to the first defendant.

(ix) There is nothing in the evidence of PW1 and Ismail to show that the first defendant was informed or made known that she was merely holding the PDC shares or the Rasa Rata shares in trust for the plaintiff.

(x) It is not clear as to when and how the transfer was made or the trust was created. Putting it in another way, there is no certainty that at the time the PDC shares were acquired and transferred to the first defendant, it was meant solely for the plaintiff's benefit.

[17] In any event, for the plaintiff to rebut the first defendant's contention the ascertainment of a donative intention must be in accordance with the facts and circumstances of this case.

[18] Here, the plaintiff is a limited liability company which claims to be a donor and a beneficiary of a resulting trust in an action which was brought more than 20 years after the shares in dispute were transferred in the first defendant's name.

[19] It is common knowledge that a company is a separate and distinct entity from its shareholders. Hence, in the present case, the existence of trust documents or other supporting documents such as the board of director's resolution becomes necessary. Furthermore, this is not a case of an individual donor or that of a deceased person where the court is left without recourse or indication as to what was intended by the parties that the court should resort to presumptions.

[20] It is pertinent to note that the plaintiff did not lead any evidence to prove the plaintiff's intention that the PDC shares were to be held by the first defendant as a trustee or nominee for the plaintiff. The consequence is that the trial court ought to have drawn an adverse inference against the plaintiff.

[21] In assessing the plaintiff's case, the cumulative circumstances and the background relationship of the parties ought to be considered. It is undisputed that:

(a) At all material times, Ismail is in complete control of the plaintiff. Ismail is the majority shareholder of the plaintiff. He is the registered owner of 36,400 ordinary shares. The remaining 467,600 ordinary shares in the plaintiff are registered in the name of PW1. However PW1 in his cross-examination admitted that he merely holds the shares in trust for Ismail. Ismail is also the managing director of the plaintiff. Other directors of the plaintiff are Ismail's children;

(b) the fact that the first defendant was Ismail's wife when the PDC shares were transferred to her and that no trust document or other supporting documents were prepared by the plaintiff company does not support the existence of a trust;

(c) based on the above facts, it could be inferred that it was Ismail, the majority shareholder and managing director of the plaintiff who had effected the transfer of the PDC shares to the first defendant; thus

(d) the plaintiff must be estopped from claiming that the first defendant is a mere nominee in view of Ismail's affidavit filed in the 2002 suit acknowledging the first defendant as the beneficial and registered owner of the Rasa Rata shares.

[22] These are the facts and circumstances of the case which the learned judge should have taken into consideration when assessing the plaintiff's case.

[23] The trial judge had thus misdirected himself in coming to the conclusion he did.

[24] In the circumstances, taking into account the facts and circumstances of this case in its entirely, we are unanimous in our decision that the impugned shares in the second defendant are held by the first defendant as the registered and beneficial owner thereof and that therefore the first defendant is entitled to those said shares.

[25] We therefore allow this appeal with costs. Costs is fixed at RM20,000 here and below. The deposit is to be refunded to the first defendant/appellant.